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In The Supreme Court Of The United States

October Term, 1987

LAURA REAGIN,

Petitioner

v.

CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit's ruling is inconsistent with Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947).

2. Whether it is proper to apply a state or federal test for sufficiency of the evidence to support a jury verdict where federal jurisdiction is based on diversity of citizenship, being the "important question" specifically left open in Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959), and a question on which the circuit courts of appeal are sharply divided.

3. Whether, assuming a federal test of evidentiary sufficiency was proper, there is any rational ground for distinguishing diversity cases from this Court's decisions under FELA.

4. Whether the Court of Appeals, in (a) ignoring an entire segment of plaintiff's appeal, and (b) adopting without legal analysis the District Court's findings on JNOV, and (c) applying the substantive law of a state other than the forum state, so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to this proceeding.

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LAURA REAGIN,
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CHARLES LAWRENCE TERRY and TROY VIRGIL TERRY, individually, and d/b/a/ Mt. Hope Shell Service Station; MT. HOPE SHELL SERVICE STATION, a Partnership; EDWARD C. BRASINGTON; SHELL OIL COMPANY; QUALITY OIL COMPANY OF STATESVILLE, INC.; and QUALITY OIL COMPANY, a Limited Partnership,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Laura Reagin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding August 26, 1987, rehearing denied October 7, 1987.

OPINIONS BELOW

The opinions of the U. S. District Court for the Middle District of North Carolina and of the Fourth Circuit Court of Appeals are unreported. Those opinions and orders thereon are set forth in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on August 26, 1987. The petition for rehearing was filed on September 9, 1987, and denied October 7, 1987. Final judgment was entered on October 7, 1987. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

U. S. Constitution Amendment V:

No person shall ... be deprived of life, liberty, or property, without due process of law ....

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (c) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

Rule 50(b) of the Federal Rules of Civil Procedure:

(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

I. STATEMENT OF THE CASE

A. Resume of Facts

Reference herein to the Appendix in the Court below will be cited as (R ___). References to the Appendix in this Court will be cited as (A ___).

Plaintiff Laura Reagin was brutally raped, then kidnapped, in the early morning hours of June 17, 1982, at an isolated service station bearing Shell Oil Company insignia near Greensboro, N.C. She filed a complaint in the United States District Court for the Middle District of North Carolina, asserting diversity jurisdiction under 28 U.S.C. § 1332, and alleging that the station owners, Charles and Troy Terry, and the station attendant, Edward C. Brasington, were negligent in the supervision, maintenance and safeguarding of the premises, and that the defendants Shell Oil Company and

Quality Oil Company were liable upon principles of actual or apparent authority. Before trial, the District Court dismissed the action against the station attendant Brasington upon his motion for summary judgment and at trial dismissed the action against the Quality Oil Company defendants at the close of all the evidence. A jury composed of four men and two women returned a verdict of $450,000 in damages against the station owners and against Shell Oil Company. The District Court, however, granted judgment notwithstanding the verdict under Rule 50(b) for all defendants. The Court of Appeals for the Fourth Circuit affirmed and denied plaintiff's timely petition for rehearing and suggestion for hearing en banc.

The facts, stated in the light most favorable to the plaintiff as

required for decision under Rule 50(b), are as follows: At 3:30 a.m. on June 17, 1982, plaintiff Laura Reagin, a 24 year old female traveling from Atlanta to New Jersey on Interstate I-85 near Greensboro, N.C., stopped at the isolated Mt. Hope Shell Service Station which had attracted her by its Shell sign above the highway. Plaintiff was influenced to stop by previous Shell advertising which depicted its stations as safe, clean places to stop.

The station was staffed only by Edward Brasington, the partially-crippled father-in-law of the Terry defendants. Brasington's physical and mental condition was such that he was not permitted to perform even minor repair work at the station and his limitations were noticeable after only brief observation. (R 437, 496). Brasington carried in his pants pocket

a small pistol given him by owner Troy Terry. (R 624-5, 736). Brasington carried the pistol because, admittedly, he was afraid and, as he said, "You don't never know what's coming in there on you." (R 623, 626).

Because visibility into the station was blocked by window displays, plaintiff walked into the station unaware that at that moment a robbery was in progress by an assailant who had been allowed by Brasington to loiter on the premises for 45 minutes to an hour prior to the time the robbery began. As the plaintiff entered the station she saw Brasington standing to her left in front of another man and, noticing nothing unusual, proceeded to the ladies room. When she emerged a few moments later she observed over tops of the blocked windows the heads of the two men walking to the left of the

station, so she turned her back and waited at the cash register to pay for food items she had selected. (R 333-4). The cash register was directly in front of the entrance to the station. The man returned to the station, stuck Brasington's pistol in plaintiff's back, emptied her pockets, and took her at the point of Brasington's pistol to the side of the station where a pole light was extinguished. There he brutally raped plaintiff. (R 334-5, 344). The area under the pole light where the rape occurred would have been visible from Mt. Hope Church Road in front of the station if the pole light had been operating. (R 346).

Brasington made no effort to call for assistance during the rape, but watched it occur from a position 75 to 100 feet away in an adjacent field. (R 336-7, 341, Exh. 3). The rape took

half an hour or more to accomplish. After it was completed, shortly after 4:00 a.m., the assailant drove Reagin's car over 40 miles to Durham, N.C., requiring her to accompany him in the right front seat. At Durham, the assailant released Reagin and her car. With the help of a police officer, she managed to get to Duke Hospital where she was treated for shock and virtually non-existent blood pressure due to the loss of blood from a tear in her vagina. Plaintiff continues to suffer severe emotional and psychological damage caused by the rape. Neither Court below questioned the reasonableness of the jury award, and defendants did not appeal as to the amount thereof.

The assailant--one Lorenzo Woodward who was apprehended by Durham police the next day--had arrived at the

station on foot 45 minutes to an hour before plaintiff, telling Brasington that his automobile was disabled on Interstate I-85. However, Woodward refused Brasington's offer to call for a wrecker, saying he would call his own wrecker. (R 593, 608-10). He said he was driving from California to Florida--thus a stranger to the area--but he asked for no suggestions and did not say whom he might call for assistance. At the time there was in the cash register over $500 and an amount in excess of $100 on the person of Brasington.

Subsequently, when a doughnut route salesman arrived on his regular rounds at the station, Woodward immediately disappeared into the restroom. He came out a few moments later but, seeing the salesman still present, quickly ducked back inside.

Although Woodward's reasons for "hanging around" (Brasington's words) the station were obviously suspicious or non-existent Brasington did not use the opportunity when Woodward was in the restroom to call the Sheriff's deputies and ask them to come by, even though it was his practice to call them two or three times per week when suspicious characters were around.

When Woodward emerged from the restroom a third time he found the salesman gone and Brasington sitting with a cup of coffee facing away from the restroom door. Woodward approached Brasington from behind and, according to the testimony of Brasington, stuck what Brasington claimed was a sawed-off shotgun or rifle in his ribs, announced he was robbing the station, and immediately took Brasington's pistol from his pocket. It was at about this

time that the plaintiff arrived on the premises. (R 611, 615-17).

While plaintiff was in the ladies room the assailant used Brasington's pistol to escort the attendant to the darkness at the side of the station where the light was out and ordered him off into a field. (R 599). When she emerged from the restroom Reagin saw the two men cross a portion of the station front but did not see the gun in Brasington's back because display racks and advertisements blocked the windows and allowed her to observe only the heads of the men. (R 334-5, 354). It was Brasington's pistol the assailant then used to hold on Reagin during the rape. Brasington testified that after the sawed-off weapon was stuck in his ribs he never saw it again. Plaintiff's testimony was to seeing the pistol; the sawed-off

weapon, if it existed, was never located by law enforcement officers despite searches therefor.

The station had twice previously been the subject of armed robbery. One such incident resulted in the serious maiming and permanent injury of the third shift attendant. Homes and other businesses in the vicinity had been victims of criminal activity. (R 429-30, 675). Brasington testified that he regularly called the Guilford County Sheriff's Department two to three times a week because of suspicious activity in the area. (R 626). Despite Brasington's admitted fear, the station had no security devices, unless the illegal carrying of a concealed weapon by Brasington and a direct dial phone line to the Sheriff's Department be considered such. Security training, offered by Shell,

had not been utilized. (R 626, 637).[1]

At trial, plaintiff offered testimony from Mark Campbell, an owner of several service stations, and former owner of the Mt. Hope Shell station. Campbell provided testimony useful to the Court and jury on appropriate standards of care and proximate cause, including the importance to safety of a second person on the premises (R 467), of good lighting (R 460, 486), of his instructions to night attendants to let no one get in behind them (R 472), of the avoidance of loiterers on the premises (R 467, 477), and of the importance to security of requiring clear visibility both into and out of the station (R 461).[2]

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[1]The station is now closed during the nighttime hours in the wake of another armed robbery in 1985.

[2]Even without Campbell's testimony the jury was competent to decide the case because there is nothing in the

B. Discussion of Rulings by the Courts Below.

In his opinion granting judgment notwithstanding the verdict the District Judge, while holding there was "just enough" evidence to permit the jury to find that the criminal act of Woodward was foreseeable, nevertheless granted JNOV for the defendants solely on the ground that, because Woodward was an experienced criminal, reasonable security measures--inferred by the Judge from the facts before the Court to be uncluttered windows, a second station attendant, and adequate lighting--would not have deterred the attack. Thus his decision was bottomed

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case which is "so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the parties was reasonable." Butler v. Acme Market, Inc., 89 N.J. 270, 445 A.2d 1141 (1982). See Fitzgerald v. Manning, 679 F.2d 341, 350 (4th Cir. 1982) (jurors can act on "common knowledge").

solely on an absence of proximate cause. It cannot be said that defendants' conduct "actually caused" plaintiff's injuries, he said. (A 24).

The District Judge reasoned that the blocked windows were not a cause, since plaintiff noticed nothing untoward when she stepped in the front door. (A 21). Here the Court ignored the fact that from the station door the view of the assailant's back blocked a view of the pistol. From the station front she would have had a side view of the occurrence. The Court further reasoned that the extinguished light did not cause the injury because the assailant could have taken the plaintiff out into the darkened field to accomplish his purpose. (A 22). But would he have done so? It was a rainy, muddy night. For the Third Circuit the fact that an assailant had

dragged his rape victim to a darkened area supplied all the proof needed on proximate cause. Kenny v. Southeastern Pennsylvania Transportation Authority, 581 F.2d 351 (3d Cir. 1978), cert. denied 439 U.S. 1073, 59 L.Ed.2d 39, 99 S.Ct.845 (1979). Moreover, and as Mark Campbell testified, it is generally accepted that neat, well lighted premises constitute a deterrent to criminal activity generally. Finally, the District Court reasoned that because the assailant was an "experienced criminal" who was determined to "rob something," it was "sheer speculation" to find that a second attendant would have deterred him. (A 23). This ruling ignored the common sense adage as to safety in numbers, the testimony from Mark Campbell as to the greater safety to the public afforded by an additional

person, and the very important circumstantial evidence that so long as there was a second person on the premises the assailant remained hidden in the restroom, biding his time for when Brasington would be alone. It also ignored the fact that Brasington's crippled condition made him an obvious easy mark for violent crime.

The District Judge's opinion mentioned, in a footnote, plaintiff's contentions that it was also negligence for the station operators to have an incompetent night attendant on duty and to arm him with a pistol, and for the attendant to have allowed the assailant to loiter in the station prior to the robbery. But the Court did not deal with these contentions at all, except to say that the Court had already instructed the jury that they could not find the action or inaction of the

attendant was negligence, "since he had no time or duty to act because he could not do so without risk to his own safety." The Court further stated, in expiation of Brasington, "The evidence also indicated that the assailant 'got the drop' on the attendant from behind with a sawed-off shotgun or rifle, and then disarmed him." (A 20, fn. 1).

Obviously, this discussion by the District Court did not meet the issues, but it seems, in fact, to be a holding that it was not negligence, and thus not a violation of duty, for the station to be staffed by an incapable attendant, for him to carry a pistol in violation of North Carolina law, which was used by the assailant, for him to allow a loiterer to remain on the premises, and for him to carelessly allow the loiterer to "get the drop on

him" in the first place. It appears that the District Court may have believed his ruling granting summary judgment to the attendant Brasington precluded plaintiff's recovery for any of the foregoing reasons. In any event, it is clear that the District Court's ruling on these issues did not turn on proximate cause, but on an absence of duty.

In fact, these were vital issues. Carrying a concealed weapon is illegal in North Carolina and should be negligence per se, since the statutory prohibition is for the safety of the public. State v. Bridgers, 169 N.C. 309, 310, 84 S.E. 689 (1915); State v. Gainey, 273 N.C. 620, 160 S.E.2d 685, 686 (1968); Bell v. Page, 271 N.C. 396, 156 S.E.2d 711, 715 (1967). The jury had a right to infer that the assailant had no other weapon than

Brasington's pistol with which he assaulted her, since none was ever found or seen again by anyone, including Brasington. Further, allowance of loitering is frequently held to be negligence. Wesley v. Greyhound Lines, Inc., 47 N.C.App. 680, 700, 268 S.E.2d 855, 867 (1980) (loiterers in bus station); Peters v. Holiday Inns, Inc., 89 Wis.2d 115, 278 N.W.2d 208 (1979) (assailant in lobby, not to rent a room but looking for a motel employee at 3:00 a.m., was a suspicious circumstance requiring motel staff to monitor his whereabouts). And to hold that because the "assailant got the drop" on the attendant excuses anything the assailant did before or after the assailant "got the drop" is not only illogical it begs the question whether the attendant was negligent in the first place in letting the

assailant get in position to "get the drop." Clearly he was so negligent. See Harris v. Pizza Hut, 445 So.2d 1364 (La. 1984) (security guard held negligent where he sat eating).

Plaintiff appealed the District Court's rulings on JNOV and summary judgment to the Fourth Circuit Court of Appeals. In a per curiam opinion, that Court affirmed the District Court's ruling that "it was mere speculation for the jury to find the alleged breaches were the cause of Reagin's injuries." (Emphasis supplied). Except for one incursion into legal discussion set forth in its footnote 2, in which the Court of Appeals stated that Reagin's claim of negligence in having merchandise racks blocking her view into the station was without foundation,[3] the Court of Appeals

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[3]In its analysis of this evidence, the Court of Appeals completely

engaged in no analysis of the case, but in effect adopted the reasoning of the District Court, and affirmed, citing Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982), an age discrimination case, solely on grounds of lack of causation. (A 55; 54, fn. 2).

The Court of Appeals, having agreed with the District Court that there was an absence of causation, held that the remaining issues raised on appeal are "mooted by the affirmance of the district court's decision." Here

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overlooked the testimony of former station owner, Mark Campbell, who testified unequivocally that for security reasons he always required clear visibility both into and out of the station. (A 461). The fact that Campbell's security reasons were not necessarily for the prevention of rape is, of course, immaterial. Plaintiff need not prove the defendant should have foreseen the crime in the exact form in which it occurred. Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 642, 281 S.E.2d 36,40 (1981).

the Court of Appeals obviously overlooked the issues previously discussed which the District Court had handled on the basis of no negligence, or lack of duty, rather than lack of causation.[4] These issues could not be moot, nor could the grant of summary judgment for Brasington be moot, on the basis of lack of causation. They were not decided on that basis by the District Court, but to the extent they were decided at all, they were decided

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[4]The District Court granted summary judgment for Brasington before trial solely on the ground that he had no duty to act once the assault began because he could not do so with safety for himself, ignoring the other grounds of liability as to Brasington previously discussed. This ruling was not supported by the facts, in view of the availability of a telephone in a nearly darkened station, nor by the law, Boles v. La Quinta Motor Inns, 680 F.2d 1077 (5th Cir. 1982), especially since Brasington created by his earlier negligence the situation which placed plaintiff in jeopardy. Parrish v. Atlantic Coastline Railway Co., 221 N.C. 292, 20 S.E.2d 299, 304 (1942).

on the basis that they did not constitute negligence, which was clearly erroneous. Plaintiff pointed out these matters to the Court of Appeals in a petition for rehearing, but the petition was denied without opinion. (A 56-7).

II. REASONS THE WRIT SHOULD BE ALLOWED

A. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 68 S.Ct. 140 (1947) is Authority for Summary Reversal of the Case.

In Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, (1947), the plaintiff was a young woman working as a telegraph operator at night in a one room frame building in an isolated part of railroad yards where dangerous characters were known to frequent. There were men operating trains in the yards, who called for messages at irregular intervals during the night, and who because of the absence of any window on the side of the building in

which the door was placed could not be identified by the plaintiff when they knocked. As a result plaintiff responded to a knock, thinking that a trainman was seeking admission, and before she could close it a man entered and beat her with a large piece of iron, seriously and permanently injuring her. The assailant was not an employee of the respondent and the attack was criminal. The District Court dismissed the complaint for failure to state a cause of action and entered summary judgment and the Sixth Circuit Court of Appeals affirmed without opinion. The District Court stated, in explanation of its action, that there was no causation between the injury and respondent's failure to light or guard the premises, and that the law does not permit recovery for intentional or criminal acts. In a per

curiam opinion this Court reversed, saying:

> We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence.

The parallels between the Lillie case and the case before this Court are obvious. The danger to patrons of the Mt. Hope Shell Service Station was not only foreseeable, it was foreseen, as evidenced by Brasington's fear, his bearing of a pistol, and his frequent calls to the Sheriff's Department, and the District Court specifically found

evidence of foreseeability. At issue here, as in Lillie, is whether there was a causal connection between inadequate lighting and inadequate personnel and plaintiff's injuries.[5] If federal law applies here to evidentiary sufficiency, as the Courts below held, the Lillie case should control the present case. If it be contended that Lillie was decided under the FELA statute, as it was, that fact is immaterial. The discussion by the Court in Lillie was related to common law negligence and proximate cause, not to statutory provisions. As we discuss in Subsection C , infra,

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[5]The reference in Lillie was to the failure to "guard the premises," whereas the discussion in the District Court below was related to an additional attendant. The difference, if any, is immaterial. Defendants obviously recognized the need for a guard. Otherwise why did they furnish Brasington a pistol? He was clearly an inadequate guard, as plaintiff contended.

this Court has cited FELA cases as applicable in diversity actions. Nor is it important that Lillie came up on the pleadings from summary judgment. The facts in this case easily rise to the level of proof alleged in Lillie and this Court's recognition that it could not rule out proximate cause as a matter of law there is equally applicable here.

On the basis of Lillie alone it is respectfully submitted that this Court should reverse the findings of the Fourth Circuit, as it did recently in Anderson v. City of Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985).

B. This Court Should Resolve the Conflict In the Circuits as to Whether State or Federal Law Applies as to Evidentiary Sufficiency.

1. The Issue is Very Important to the Administration of Justice.

The importance of the issue to whether the sufficiency of evidence in a diversity case to create a jury question is governed by state or federal law is easily demonstrated by the fact that 63,672 diversity cases were filed in 1986 alone.[6] The circuit courts of appeal are hopelessly divided on the question. Cases within the individual circuits are inconsistent. See the discussion in Denneny v. Siegel, 407 F.2d 433, 437-39 (3d Cir. 1969), candidly stating that because of the uncertainty as to which law applies "our decisions have displayed aberrant tendencies." 407 F.2d at 439.

Because of the differing views within the individual circuits it is sometimes difficult to determine which

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[6]The Annual Report of the Director of the Administrative Office of the United States Court 1986, Table C-2, p. 175.

circuits hold that state law applies and which hold that federal law applies. According to an annotation in 10 A.L.R.Fed. 451 the cases from the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits seem to hold that federal law applies, while cases from the Sixth and Eighth Circuits apply state law to determine the sufficiency of the evidence to go to the jury. The Second and Third Circuit cases, according to that annotation, reflect conflicting views. A prominent commentator points out that several of the courts of appeal have declared "that the question is still open," citing cases from the First, Third, Sixth and Eighth Circuits. The 1987 supplement by that commentator, however, cites cases from the Fifth and Tenth Circuits, indicating that the federal test controls, and cases from

the Sixth and Seventh Circuits indicating that the test is to be decided pursuant to state law. See 9 Wright & Miller, Federal Practice & Procedure, § 2525, pp. 548-54 (2d Ed. 1971) (1987 Supp.). A partial compilation by counsel of the positions of the various courts of appeal appears in the Appendix at page 81.

The division between the circuit courts of appeal arises because this Court has never decided the question and, in at least two cases, has expressly left the matter open. Before discussing the cases in this Court it should be pointed out that there is no question but that state law must be resorted to in determining the substantive elements necessary to create rights and duties in a diversity action. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct.

817 (1938). The present question goes to the degree of proof required to establish the rights and duties under state law. See 9 Wright & Miller, Federal Practice & Procedure, supra, at 551. Furthermore, the present question is not involved in the law regarding a division of functions between judge and jury, as was the case in Byrd v. Blue Ridge Rural Elec. Coop. Co., Inc., 356 U.S. 525, 2 L.Ed.2d 953, 78 S.Ct. 893 (1958).

In Byrd, supra, this Court referred to Stoner v. New York Life Ins. Co., 311 U.S. 464, 85 L.Ed. 284, 61 S.Ct. 336 (1940), a non-jury action regarding conflicts between state and federal rulings involving the same parties, as having "held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the

state-created right was established." Byrd, 356 U.S. 525, 540, n. 15, 2 L.Ed.2d at 964, n. 15, 78 S.Ct. at 902, n. 15. But a year later in 1959 this Court, in Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959) said:

> Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement .... But the question is not properly here for decision .... Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same. A decision as to which standard should be applied can well be left to another case where the question is briefed and argued. 359 U.S. at 444-45, 79 S.Ct. at 926, 3 L.Ed.2d at 941.

In 1964, this Court granted certiorari specifically to determine the question but refrained from deciding the question when it found

that "the evidence was sufficient under any standard which might be appropriate--state or federal." Mercer v. Theriot, 377 U.S. 152, 156, 12 L.Ed.2d 206, 84 S.Ct. 1157, 1160 (1964).

Manifestly, this is a question which needs a definitive ruling from this Court. We respectfully submit that it is a question even more basic than that believed to be extremely certworthy by Justice White in Venture Technology, Inc. v. McDaniel Fuel Gas Distribution Corp., 459 U.S. 1007, 74 L.Ed.2d 398, 103 S.Ct. 362 (1982), involving the evidence to be considered on JNOV motions in anti-trust cases.

2. The Federal Standard of Evidentiary Sufficiency Applied by the Courts Below Deprived Plaintiff of a Recovery She Would Have Had Under State Law.

The District Court held that in a diversity case sufficiency of the

evidence to create a jury question is governed by federal law. (A 9). The Court of Appeals affirmed, citing a Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-2 (4th Cir. 1982), a case which attempted to articulate federal standards on causation to the effect that the inferences drawn by the jury must be reasonably probable; mere speculation is insufficient. (A 55). Counsel for petitioner, in her petition to the Court of Appeals for rehearing, pointed out that these rulings, assuming they accurately stated federal law as applied to this case, placed a substantially greater burden as to the sufficiency of the evidence on causation than does the state law of North Carolina. Petitioner pointed out that when the Fourth Circuit in Wratchford v. S. J. Groves & Sons, Inc., 405 F.2d 1061 (4th Cir. 1969),

confirmed the rule that a federal standard applies to the question whether evidence is sufficient for a case to go to the jury the opinion had as its expressed purpose the protection of a litigant's right to jury trial under the Seventh Amendment, in the face of a more restrictive state rule under Maryland law which would have precluded submission of the case to the jury. Wratchford was correct in this. The Seventh Amendment should control "where to follow the state rule would deprive the party of the verdict of a jury under circumstances where, at common law, he would have been entitled to go to the jury." 9 Wright & Miller, Federal Practice and Procedure, § 2525, p. 548 (2d Ed. 1971). See the dissenting opinion of now Chief Justice Rehnquist that "[t]he right of trial by jury thus preserved [by the

Seventh Amendment] is the right which existed at English common law when the amendment was adopted." Parklane Hosiery v. Shore, 439 U.S. 322, 344, 58 L.Ed.2d 552, 570, 99 S.Ct. 645 (1979), quoting Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657, 79 L.Ed. 1636, 55 S.Ct. 890 (1935),

But with the ruling in this case, and the rulings in other recent cases, the Fourth Circuit now seems to use the rule that federal law governs the question as to the sufficiency of evidence to restrict state common law rules on the right to jury trial rather than to protect those Seventh Amendment rights, as was the purpose of Wratchford. There must be what the Fourth Circuit calls interchangeably "reasonable probability," or "substantial probability," for a jury to find causation. Lovelace v.

Sherwin-Williams Co., 681 F.2d 230, 242 (1982). Moreover, there must be "substantial evidence" of causation to warrant submission of the question to a jury. Millers Mutual Insurance Association v. Southern Railway, 483 F.2d 1044 (4th Cir. 1973). More recently the Fourth Circuit seems to have embraced an even stricter rule and now requires that a plaintiff must show that his injury was "more likely than not" caused by the action of the defendant. See Owens by Owens v. Bourns, Inc., 766 F.2d 145, 149-50 (4th Cir. 1985) cert. denied 106 S.Ct. 608 (1986); Fitzgerald v. Manning, 679 F.2d 341, 349 (1982); Ralston Purina v. Edmunds, 241 F.2d 164, (4th Cir. 1957), cert. denied 353 U.S. 974, 1 L.Ed.2d 1136, 77 S.Ct. 1059 (1957). See Note, Sufficiency of Causation Evidence

to Warrant Submission of the Case to the Jury. 21 Wake Forest L.Rev. 1155 (1986). The District Court was advertent to this stricter requirement, citing both Owens and Ralston Purina in support of his decision.

The "more likely than not" requirement is directly at odds with the earlier ruling by the Fourth Circuit in Wratchford, supra, and certainly with the mandate of this Court in such cases as Lavender v. Kurn, 327 U.S. 645, 90 L.Ed. 916, 66 S.Ct. 740 (1947). Noting that Lavender has been accepted as "establishing the standard for use in diversity cases," Wratchford explicitly disavowed the concept that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is as probable as the other, and stated

that it is the province of the jury to resolve conflicting inferences from circumstantial evidence. Wratchford v. S. J. Groves & Sons, Inc., 405 F.2d at 1066.

The truth is that "any attempt to suggest mathematical precision in the weighing of probabilities is spurious; rarely does the court have any way of knowing what the mathematical probabilities are." Wright & Miller, Federal Practice & Procedure § 2528, pp. 565-66 (2d Ed. 1971). A case may not be taken from the jury merely because "a measure of speculation and conjecture is required." Lavender v. Kurn, supra, 327 U.S. at 653, 90 L.Ed. at 923, 66 S.Ct. at 744. Thus, unless reasonable minds could not differ it is for the jury to determine what weight is to be given any inference. To substantially the same

effect see Justice White's opinion in the anti-trust case of Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 700-01, 8 L.Ed.2d 777, 82 S.Ct. 1404 (1962).

There can be no doubt in this case that under North Carolina law the question of causation was for the jury. There are several reasons for this. In the first place the District Court and the Court of Appeals misstated the North Carolina substantive law on causation.[7] Both the District Court and the Court of Appeals viewed the question to be whether the negligence of the defendants was "the cause of

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[7]It is uniformly agreed that Erie R.R. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) requires the application of state substantive law in diversity cases. It should not, therefore, be arguable that if the District Court and the Court of Appeals did not properly apply state substantive law error has occurred.

Reagin's injuries."[8] Manifestly, this is not the test for proximate causation in North Carolina. The defendants' negligence need not be the underlying proximate cause; it is sufficient if it is only a proximate cause of an injury. Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559, 565-66 (1984). Plaintiff needed only to establish that "any degree, however small" of her injuries were due to the defendants' negligence. Rattley v. Powell, 223 N.C. 134, 136, 25 S.E.2d 448, 450 (1943) (Emphasis supplied).

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[8]See the Court of Appeals opinion. (A 53-4). The District Court phrased his ruling thusly: "It cannot be said on the basis of evidence presented at trial that Defendants' conduct actually caused Plaintiff's injuries as a matter of fact; neither can it be said that those injuries would not have been sustained without Defendants' conduct or failure to act." This is language of sole proximate cause. See Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 506, 1 L.Ed.2d 493, 499, 77 S.Ct. 443 (1957).

In Price v. Gray, 246 N.C. 162, 166, 97 S.E.2d 844 (1957) the Supreme Court of North Carolina expressly rejected that plaintiff would have to prove the proximate cause because of the undue burden this would entail. Rather, "the negligence of each party was a proximate cause; the negligence of neither was the proximate cause." 246 N.C. 162, 168, 97 S.E.2d 844, 849 (1957).

In the second place, and most importantly, under North Carolina law, and the common law generally, the test of whether harm to a plaintiff is foreseeable is the test for proximate cause. "The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of defendant." Williams v. Carolina Power & Light Co.,

296 N.C. 400, 250 S.E.2d 255, 258 (1979). (Emphasis supplied).

In Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 311 S.E.2d 559, 566-67 (1984) the Supreme Court of North Carolina said:

> It is only when the facts are all admitted and only one inference may be drawn from them that the Court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case .... Hence, what is the proximate cause of an injury is ordinarily a question for the jury. [Citations omitted] [Emphasis supplied].
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> * * * * *
>
> The well settled rule in this jurisdiction is that excepting cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act. [Citations omitted] [Emphasis supplied].

Notably, North Carolina cases which have found criminal acts foreseeable have also found sufficient evidence of causation. Wesley v. Greyhound Lines, 47 N.C.App. 680, 268 S.E.2d 855, 867 (1980); Urbano v. Days Inn of America, Inc., 58 N.C.App. 795, 295 S.E.2d 240, 242 (1982). Here, the District Court found plaintiff's injury to be foreseeable and the Court of Appeals did not disagree. The subsequent finding by those Courts that "it was mere speculation for the jury to find the alleged breaches were the cause of Reagin's injuries" is basically inconsistent with the finding by the District Court of foreseeability and reveals a lack of recognition that this type case is nearly always based on circumstantial evidence. An example from Professor Prosser is instructive. "When a

child is drowned in a swimming pool, no one can say with certainty that a lifeguard would have saved the child; but the experience of the community permits the conclusion that the absence of the guard played a significant part in the drowning. Such questions are peculiarly for the jury ...." Prosser & Keeton, The Law of Torts, p. 270 (5th Ed. 1970). Earlier cases in the Fourth Circuit recognize, as did Lavender v. Kurn, supra, that some measure of speculation and conjecture are necessarily always present in this type of case. Harner v. John McShane, Inc., 394 F.2d 480, 482 (4th Cir. 1968).

Also implicit in both lower court decisions is the belief that the criminal act broke the causal chain. The District Court stated, "[t]he evidence is uncontradicted that the

assailant was an experienced criminal, just a few days out of prison who determined ... to 'rob something.'" (A 24-5). The Court of Appeals described the case as one "alleging responsibility for the criminal acts of [the assailant]." (A 52). These statements miss the point. It is the law in this Court and in North Carolina that it is irrelevant that a third party's act is criminal once foreseeability establishes a duty to safeguard against crime. Lillie v. Thompson, 332 U.S. 459, 92 L.Ed. 73, 78, 68 S.Ct. 140 (1947); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36, 40 (1981).

C. This Court Should Clarify Whether its Decision on Evidentiary Sufficiency in FELA and Jones Act Cases Apply in Diversity Cases.

The leading case in this Court on evidentiary sufficiency is Lavender v.

Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1947), in which this Court said:

> It is no answer to say that the jury's verdict involves speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or believe whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might have drawn a contrary inference or feel that another conclusion is more reasonable. (Emphasis supplied). 327 U.S. at 653, 90 L.Ed. at 923, 66, S.Ct. 740.

There are numerous cases involving similar reasoning in this Court, including, for example, Tennant v.

Peoria & Pekin Union Railway, 321 U.S. 29, 88 L.Ed. 520, 64 S.Ct. 409 (1944), Brady v. Southern Railway Co., 320 U.S. 476, 88 L.Ed. 239, 64 S.Ct. 232 (1944), and Bailey v. Central Vermont Railway Co., 319 U.S. 350, 87 L.Ed. 1444, 63 S.Ct. 1062 (1943). These cases were decided under statutes such as the Federal Employers Liability Act and the Jones Act. But there is no good reason to believe that they are not precedent for diversity actions, and in fact this Court has considered them as such. In Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959), this Court, in footnote 8, cited the Brady and Bailey cases, supra, as setting forth the federal rule of evidentiary sufficiency. Significantly, the Fourth Circuit case of Wratchford v. S. J. Groves & Sons, Inc., 405 F.3d 1061 (1969), which

confirmed the adoption of a federal rule of evidentiary sufficiency cited Lavender v. Kurn, supra, as the federal standard to be applied in diversity cases.

In Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, n. 6, 8 L.Ed.2d 777, 782, 82 S.Ct. 1404, 1409, n. 6, (1962) a private anti-trust case, this Court, per Justice White, cited the Tennant case, supra, as indicating the rule on appellate review of a jury verdict. And in per curiam opinions, this Court has reversed judgments of lower courts which had substituted their views on the sufficiency of the evidence for that of the jury in non-FELA or Jones Act cases. See, e.g., Williams v. Carolina Life Ins. Co., 348 U.S. 802, 99 L.Ed. 633, 75 S.Ct. 30 (1954), reversing C.A. 5th, 1954, 210 F.2d 477;

Swafford v. Atlantic Coast Line R. Co., 350 U.S. 807, 100 L.Ed. 725, 76 S.Ct. 80 (1955), reversing C.A. 5th, 1955, 220 F.2d 901; Union Trust Co. v. Eastern Air Lines, Inc., 350 U.S. 907, 100 L.Ed. 796, 76 S.Ct. 192 (1955), reversing C.A. 1955, 221 F.2d 62, 95 U.S.App. D.C. 189; Gibson v. Phillips Petroleum Co., 352 U.S. 874, 1 L.Ed.2d 77, 77 S.Ct. 16 (1956), reversing C.A. 5th, 1956, 232 F.2d 13.

Additional reasons in support of the substantial body of opinion that the decisions by this Court under FELA and the Jones Act state a general rule applicable to all federal jury cases, including the belief that Congress could not constitutionally give a broader role to the jury in these statutory actions than that guaranteed by the Seventh Amendment, are set forth in 9 Wright & Miller, Federal Practice

& Procedure, § 2525, pp. 557-9 (2d Ed. 1971).

Since it is generally assumed that these cases evidence a more restrictive view of the circumstances under which a directed verdict, or JNOV, may be ordered than is now followed in the Fourth and some of the other circuits, it is "extremely important to know whether the decisions are confined to the particular statutory actions in which they have been handed down, or whether they represent a construction of the Seventh Amendment, and thus are controlling in all jury cases in federal courts." 9 Wright & Miller, supra, § 2526, p. 556. "A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower

federal courts. 9 Wright & Miller, supra, § 2526, p. 559.

We believe that the Fourth Circuit misapplied the federal law of evidentiary sufficiency enunciated in Wratchford and other cases. If it did not, it is clear that the grant of judgment notwithstanding the verdict in this case cannot stand scrutiny under the rules laid down in Lavender v. Kurn, Lillie v. Thompson, and other pronouncements by this Court. And so long as this Court does not, in a current case, state definitively that its pronouncements in such cases as Lavender, Tennant, Brady, and others are the law generally for jury actions tried in the federal courts there will be a tendency for the lower courts to be confused as to when they can substitute their judgments for those of juries. This case conflicts clearly

with other similar cases from other circuits. Doyle v. Exxon, 592 F.2d 44, 48 (2d Cir. 1979) (jury could conclude that criminal events were caused by Exxon's failure to install a cash safe system, which was the only evidence on proximate cause); Kenny v. Southeastern Pennsylvania Transportation Authority, 581 F.2d 351 (3d Cir. 1978), cert. denied 439 U.S. 1073, 59 L.Ed.2d 39, 99 S.Ct. 845 (1979) (fact assailant dragged plaintiff to a darkened area supplied all the proof needed that the extinguished light was proximate cause); Boles v. La Quinta Motor Inns, 680 F.3d 1077 (5th Cir. 1982) (duty to come to aid of patron in distress).

Wright & Miller are clearly correct in suggesting that a decision by this Court on the quantum of proof required would be very helpful.

D. The Treatment of Plaintiff's Appeal Departed From the Accepted and Usual Course of Judicial Proceedings.

We have previously discussed that the Court of Appeals and the District Court ignored vital issues in the case, including questions of negligence relating to the concealed weapon carried by the station attendant,and its use in the rape of plaintiff, questions relating to the negligence of the station operators in staffing the station with an incapable attendant, the attendant's allowance of loitering on the premises, and the negligence of the attendant in allowing the assailant to relieve him of his pistol. Further ignored by the Court of Appeals was plaintiff's appeal from the grant of summary judgment for the attendant, it being plaintiff's contention that the attendant had some duty under the circumstances to do more

than watch her being raped from a position in a field 75 to 100 feet away. See Section I.B., Discussion of Rulings by the Courts Below, fn. 4, supra.

28 U.S.C. § 1291 gives plaintiff, along with all other litigants, a right of appeal from the District Court to the Court of Appeals. In ignoring these very important aspects of plaintiff's appeal the Court of Appeals has, in effect, denied plaintiff her statutory right in this regard and thus Fifth Amendment due process. This is true, if for no other reason than that, assuming arguendo that the Courts below are correct that there was no proximate cause related to blocked windows, an extinguished pole light, or a second attendant, plaintiff still has a right to recovery based on the other acts of

negligence which the Courts below ignored.

Legal questions in this case abound. Yet the Court of Appeals did no more than perfunctorily write a per curiam opinion which dealt with none of the issues involved, and accepted and adopted verbatim the opinion of the District Court. If the right to jury trial is to be protected such casual disposition of appeals from a judgment notwithstanding the verdict should be ruled inadequate. The Fifth Circuit has said as much. In Western Hills Bowling Center, Inc. v. Hartford Fire Ins. Co., 412 F.2d 563, 565 (1969), the Fifth Circuit stated:

> The District Court also entered findings of fact and conclusions of law. Inasmuch as the evidence on a motion for judgment n.o.v. must be viewed by the appellate court in the light most favorable to the non-movant, Boeing Co. v. Shipman, 5th Cir. 1969, 411 F.2d 365, the findings entered by the district court have no place in this court's evaluation of the

sufficiency of the evidence. (Emphasis supplied).

It should be noted also that the Fourth Circuit relied for its decision only on Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (1982), an ADEA case where proximate cause relates to motivation and not at all to common law negligence concepts.

This inadequate and incomplete disposition of plaintiff's appeal, together with the misapplication of the substantive law of the State of North Carolina already discussed, seem so far a departure from the usual and accepted course of judicial proceedings as to call for exercise of this Court's power of supervision.

III. CONCLUSION

Defendants, with national advertising and a Shell Oil Company sign high above I-85, (1) enticed Laura Reagin into a nightmarish trap she

could not anticipate; (2) provided, through a loiterer, a rapist to attack her after she fell into the trap; (3) provided the rapist a weapon to use in accomplishing his purpose; and (4) provided a darkened area on station premises where the rapist could spend 30 minutes unmolested accomplishing his purpose.

Notwithstanding the foregoing, a United States District Judge and three Judges on the United States Court of Appeals have, without bothering to apply written legal reason to most of the issues, overturned a verdict in Miss Reagin's favor by a jury of responsible citizens of North Carolina. Judicial decisions of this sort, while no doubt conceived in good faith, continue the "gradual process of judicial erosion of the essential guarantee of the Seventh Amendment,"

frequently lamented by distinguished members of this Court, including Justice Black in Galloway v. United States, 319 U.S. 372, 397, 87 L.Ed. 458, 63 S.Ct. 1077 (1943) (dissenting opinion), and now Chief Justice Rehnquist, in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339, 58 L.Ed.2d 552, 567, 99 S.Ct. 645 (1979) (dissenting opinion).

Beyond the important questions relating to the trial of cases in the federal courts as already discussed this case also has peculiar substantive significance in view of the interstate travel involved. If businesses located along interstate highways are free to subject their patrons to the kind of danger the non-existent security in this case engendered interstate travel will indeed become very hazardous. And in view of our vast interstate

highway systems the federal courts may well become a principal forum for these types of cases. As Justice Daniel O'Hern, of the New Jersey Supreme Court recently said in a similar case, "If crime reduction is to become anything more than wishful thinking, citizens must care enough to devote energy, money, and--most of all--themselves to the fight for positive results ...." Butler v. Acme Markets, Inc., 89 N.J. 270, 445 A.2d 1141, 1146 (1982), quoting the National Advisory Commission on Criminal Justice Standards and Goals, Community Crime Prevention 196 (1977).

It is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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I, Barbara E. Grove, being first duly sworn, deposes and says: On January 5, 1988, I filed with the Clerk's Office of the Supreme Court of the United States the foregoing Petition for a Writ of Certiorari and Appendix to and further certify that I mailed this same date the required three copies via first-class mail to the opposing counsel listed below:

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TO WIT:

This day personally appeared before me, a notary public in and for the aforesaid jurisdiction, Barbara E. Grove, who made oath that the statements contained herein are true and accurate to the best of her information, knowledge and belief.

Given under my hand this 5th day of January, 1988.

My Commission expires: June 9, 1991.

Notary